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In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

LUIS RAMON MORALES-SANTANA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF POPULATION AND FAMILY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are among the nation's leading scholars and researchers in the United States regarding population and family. Each has specialized expertise related to unmarried parents and their children. The complete list of signatories is as follows:

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[1] Counsel for each party has consented to the filing of this Brief, as indicated by letters filed with the Clerk of the Court. No counsel for a party authored any part of this brief in whole or part, and no person other than *Amici Curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

Because women give birth, it can sometimes be difficult to see the sex stereotyping in laws that treat mothers differently from fathers, especially for matters such as the passage of citizenship from parent to child, as is at issue here. Compare Immigration and Nationality Act of 1952 § 309(a), 8 U.S.C. 1409(a), with *id.* § 309(c), 8 U.S.C. 1409(c).

Yet, as the population and social science data discussed *infra* show, nonmarital fathers are regularly in a parental role at the time of their child's birth and many, indeed most, formally acknowledge their paternity either at the hospital or in the birthing center just after the child is born. Many, too, are parenting their children without the involvement of a mother.

Viewed in light of this data, the challenged law's imposition of extra barriers on nonmarital fathers' passage of U.S. citizenship to their children—barriers that it does not place on nonmarital mothers—appears to reflect flawed gender stereotypes about the likely involvement of unwed fathers in their children's lives.

ARGUMENT

When a child is born out of wedlock, that child may—and often does—have a father who is present and part of the child's life from the moment of birth. Yet the federal law at issue in this case requires that, to pass along U.S. citizenship, that father must have spent nine more years in the United States than the child's U.S. citizen mother, with five of those years after age 14. Immigration and Nationality Act of 1952 § 309(a), 8 U.S.C. 1409(a). By contrast, the U.S. citizen mother can pass along her citizenship to her child after having spent any one year of her life in the United States prior to the child's birth. *Id.* § 309(c), 8 U.S.C. 1409(c).

Perhaps it is difficult to see the impermissible gender stereotyping embedded in this sex-based rule because the father is not the person giving birth. The statute, however, contains no reference to either gestation or childbirth. Immigration and Nationality Act of 1952 § 309(c), 8 U.S.C. 1409(c).

Even further, the statute's explicit distinction between mothers and fathers directly contradicts the government's claim that the United States has an important gender-neutral interest in facilitating U.S. citizenship for a foreign-born child with only one legal parent at the time of birth and can impose a greater residency burden on the "second" legally-recognized parent. Cf. Pet. Br. 28 ("Although Section 1409(c) uses gendered terms by referring to 'the mother' of a child born out of wedlock, the differential treatment under that provision * * * turned on whether a foreign-born child had one legally recognized parent or two at the time of his birth.").

Indeed, the statute, as written, directly favors children born to two mothers and disfavors those born to parenting units that include a father (*e.g.*, a mother and father or two fathers). If the child has two legally-recognized parents, one a U.S. citizen and the other not, and both of those parents are mothers, the shorter time frame would apply because the statute does not distinguish between a child's birth mother and the child's other mother. See 8 U.S.C. 1409(c) ("Notwithstanding the provision of subsection (a) of this section, a person born * * * outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if *the mother had the nationality of the United States at the time of such person's birth*, and if the mother had previously been physically present in

the United States or one of its outlying possessions for a continuous period of one year.") (emphasis added).

By contrast, if a child has no mother, perhaps because she is unknown or died at childbirth or thereafter, the statute still imposes its extended-time requirement on the other parent—but only if that parent is a father. In this situation, the gender stereotyping underlying the government's stated rationale for treating mothers and fathers differently—that the United States can elevate the residency requirement for the "second parent," because that parent presents a "competing parental claim of a connection to a foreign country" (Pet. Br. 32)—is stark as well.

POPULATION DATA AND SOCIAL SCIENTIFIC ANALYSIS DEMONSTRATE THAT NONMARITAL FATHERS ARE REGULARLY IN A PARENTAL ROLE AT THE TIME OF THEIR CHILD'S BIRTH

When sex-based differential treatment is said to turn on childbirth, it can be more difficult to see the gender stereotyping involved than in some other circumstances. Population data and related social scientific analysis, however, can help illuminate the stereotyping at work in the government's reliance on legal parentage at the moment of birth (rather than at the time of the child's citizenship application) to justify the statute's different treatment of mothers and fathers.

The remainder of this brief will turn to this data, which show that parentage from the time of birth regularly includes fathers as well as mothers and that to disadvantage U.S. citizen fathers because they are not married to the child's mother reflects, impermissibly, the gender stereotype that nonmarital fathers are unlikely to participate in their children's lives.

A. Census And Other Population Data Confirm That Fathers Are Regularly Part Of The Household Of Children Born Outside Of Marriage

Although "out of wedlock" birth may be associated in the popular imagination with a mother raising her child alone, the reality is that "more than half of nonmarital births take place in a cohabiting household." Carl Haub, *Rising Trend of Births Outside Marriage*, Population Reference Bureau (Apr. 2013), http://www.prb.org/publications/articles/2013/nonmarital-births.aspx. According to the Centers for Disease Control and Prevention, "Nonmarital births are increasingly likely to occur within cohabiting unions—rising from 41% of recent births in 2002 to 58% in 2006-2010." Sally C. Curtin et al., *Recent Declines in Nonmarital Childbearing in the United States*, 162 NCHS Data Br. 4 (Aug. 2014), http://www.cdc.gov/nchs/data/databriefs/db162.pdf.

The nation's largest research initiative on births to unmarried parents in large cities across the country, known as the Fragile Families and Child Wellbeing Study, also confirmed the presence of fathers, as well as mothers, when children are born outside of marriage: "A large proportion of unmarried parents are in 'marriage-like' relationships at the time of their child's birth." Sara McLanahan et al., *Fragile Families and Child Wellbeing Study* 2 (RWJF Program Results Rep., Jan. 28, 2014), http://fragilefamilies.princeton.edu/sites/fragilefamilies/files/rwjf_program_results_report.pdf (discussing results from this longitudinal survey, which produced data generalizable to urban areas with more than 200,000 residents). "Half the studied couples were living together at the time of birth, and another 32 percent were romantically involved but living apart." *Ibid.* An additional study, based on the 1995 National Survey of Family Growth, likewise concluded that "[u]nmarried

mothers now tend to be older, to have other children, and to be living with a partner at the time of their child's birth." Kelly Musick, *Planned and Unplanned Childbearing Among Unmarried Women*, 64 J. Marriage & Fam. 915, 915 (2002) (citations omitted).

As scholars in this area have observed, "[w]hen cohabitation is ignored, two-parent families are classified erroneously as single-parent families." Larry L. Bumpass & R. Kelly Raley, *Redefining Single-Parent Families: Cohabitation and Changing Family Reality*, 32 Demography 97, 98 (1995). Professor Judith Seltzer has written similarly that "much of the recent rise in childbearing outside of marriage can be attributed to childbearing in cohabiting unions." Judith A. Seltzer, *Families Formed Outside of Marriage*, 62 J. Marriage & Fam. 1247, 1255 (2000).

Her observation that "[c]hildren in these unions start life in households with both of their biological parents instead of in a single-mother household," Seltzer, 62 J. Marriage & Fam. at 1255, helps to highlight the presence of sex discrimination in a law that imposes a significant burden on these children's fathers. As to the reason for this shift, she stated: "[c]hanges over historical time in how individuals understand and make choices about family relationships are rooted in long-term trends toward greater individual autonomy and the economic arrangements that facilitate individualism." *Id.* at 1258 (citation omitted).

Another set of scholars has similarly explained that although "[m]any people hear the words 'out of wedlock childbearing' or 'nonmarital childbearing' and imagine a single woman bearing and rearing a child by herself," the data suggest otherwise. Pamela J. Smock & Fiona Rose Greenland, *Diversity in Pathways to Parenthood:*

Patterns, Implications, and Emerging Research Directions, 72 J. Marriage & Fam. 576, 583 (2010). Writing in 2010, they observed that "[o]f all births, almost 20% are to unmarried couples who are living together, so-called cohabiting couples." *Ibid.* (citations omitted); see also Seltzer, 62 J. Marriage & Fam. at 1252 ("[w]omen are almost as likely to form nonmarital cohabiting unions as marry when they have a child.").

Indeed, unmarried cohabiting parents often have children intentionally, contradicting the related myth that out-of-wedlock births to cohabiting men and women couples are nearly all accidental. In the same 2006-2010 period studied by the Centers for Disease Control and Prevention, when close to 60% of all nonmarital births were to cohabiting parents, half of those pregnancies "were intended." Curtin et al., 162 NCHS Data Br. at 578 (stating that approximately 54% of cohabiting women "classify their pregnancies as planned") (citation omitted).

Research shows, too, "that several measures of father involvement were very similar among married and cohabiting fathers." Jo Jones & William D. Mosher, *Fathers' Involvement with Their Children: United States, 2006-2010*, 71 Nat'l Health Stat. Rep. 1 (Dec. 20, 2013), http://www.cdc.gov/nchs/data/nhsr/nhsr071.pdf.

In short, these data reveal the negative stereotyping of men within the assumption that unmarried fathers are either unaware of or have no meaningful relationship with their nonmarital children.

B. A Majority Of Fathers Acknowledge Their Paternity Promptly After A Child Is Born And Many Maintain Involvement With Their Children, Whether Or Not They Are Romantically Involved With The Child's Mother

Another prevalent, gender-based assumption, also belied by extensive data, is that fathers are reluctant to acknowledge their children legally or be involved with their children in a parental role. To the contrary, data show that being male and unmarried does *not* mean that a person will avoid parenting responsibility. *Simply put, to assume that unmarried fathers, as a category of people, do not take responsibility for their children or exercise a parental role is to make an unreasonable, gender-based assumption.*

In fact, large numbers of fathers move quickly to acknowledge their parental role and responsibility. In 2014, for example, fathers voluntarily acknowledged paternity for more than two-thirds of the roughly 1,604,870 children born outside marriage. See Brady E. Hamilton et al., *Births: Final Data for 2014*, 64 Nat'l Vital Stat. Rep. 7 (2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf; Office of Child Support Enforcement, U.S. Dept. of Health and Human Servs., *FY 2014 Annual Report to Congress*, app. tbl. 2, at 251 (May 13, 2016), http://www.acf.hhs.gov/sites/default/files/programs/css/fy2014_part_10_appendix_tables_and_glossary.pdf.

Researchers with the Fragile Families study, discussed *supra*, also found that fathers most often sign Voluntary Acknowledgment of Paternity forms shortly after the child is born, often while still in the hospital. Ronald Mincy et al., *In-Hospital Paternity Establishment and Father Involvement in Fragile*

Families, 67 J. Marriage & Fam. 611, 611, 615 (2005). Professor Mincy and his fellow researchers observed that "paternity establishment rates for nonmarital children born around the turn of the century are remarkably high-70%." *Id.* at 623. Of these acknowledgments, 81% occurred in the hospital or birthing center. *Id.* at 615; see also Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 Am. U. J. Gender Soc. Pol'y & L. 467, 476-477 (2012).

Research also shows that unmarried fathers who do not live with or have custody of their nonmarital children have, since the 1970s, been increasingly involved both personally and financially in their children's lives. Paul R. Amato et al., *Changes in Nonresident Father-Child Contact From 1976 to 2002*, 58 Fam. Rel. 41, 49 (2009). This rising level of contact with their children has continued even when fathers are no longer romantically involved with the mothers of their nonmarital children. *Ibid.*; see also Marcia Carlson, *Coparenting and Nonresident Fathers' Involvement with Young Children after a Nonmarital Birth*, 45 Demography 461, 472-473 (2008) (providing data on the number of nonresident fathers who maintain contact with their children at years 1, 3 and 5).

This desire of nonmarital fathers to maintain a relationship with their children is borne out as well by the Fragile Families study, which found that virtually all of the fathers interviewed reported that they wanted to be involved in raising their children in the coming years. Bendheim-Thoman Center for Research on Child Wellbeing, *Dispelling Myths about Unmarried Fathers*, Fragile Families Research Brief 1 (May 2000), http://fragilefamilies.princeton.edu/sites/fragilefamilies/files/researchbrief1.pdf. Two-thirds of the fathers in the study

had seen their children in the month before follow-up interviews conducted at the five-year mark. *Parents' Relationship Status Five Years After a Nonmarital Birth* at 2. Additional data from the National Center for Health Statistics show that approximately three out of four nonresident fathers are in contact with their children. Nat'l Responsible Fatherhood Clearinghouse, U.S. Dep't of Health & Human Servs., *Quick Statistics: Nonresident Fathers* 3 (2008), goo.gl/TDkvX4.

C. Fathers Regularly Raise Children As Single Parents, And Gay Fathers Are Increasingly Raising Children On Their Own, Further Undermining The Justification For Treating U.S. Citizen Fathers Differently From Mothers

As of 2013, unmarried single fathers headed 8% of all American households in the United States and comprised nearly one-quarter of all single-parent households. Gretchen Livingston, Pew Research Center, *The Rise of Single Fathers* (July 2, 2013), http://www.pewsocialtrends.org/2013/07/02/the-rise-of-single-fathers (identifying single fathers as those not living with a spouse or partner).

Also in 2013, 648,000 custodial fathers were owed child support—over 11% of all custodial parents seeking support, reinforcing the substantial caregiving role that many unmarried fathers play in their children's lives. U.S. Census Bureau, U.S. Dep't of Commerce, *Custodial Mothers and Fathers and Their Child Support: 2013*, at 2 (2016), http://www.census.gov/people/childsupport/data/files/chldsu13.pdf. Research shows, as well, that custodial fathers were due $4.17 billion in child support in 2013 from their children's mothers. *Ibid.*

Further, according to recent census data, nearly 40,000 male couples are raising children together, and

two-thirds of those couples are married. U.S. Census Bureau, U.S. Dep't of Commerce, *American Community Survey Data on Same-Sex Couples* (2014), http://www.census.gov/hhes/samesex/files/ssex-tables-2014.xlsx (relevant survey data located at Tab 1 cells H8 and H37, and Tab 2 cells D8, D37, J8, and J37).

For these couples, the inequity and irrationality of the law's preferential treatment of mothers are even more obvious. Where there are two parents and both parents are male, the U.S. citizen parent will invariably be subjected to the more burdensome citizenship rule, solely because he is male and regardless of his role in his child's life.

D. International Data Reinforce That Large Numbers Of Unmarried Fathers Function As Parents Alongside Their Children's Unmarried Mother

Many children born outside of the United States to unmarried parents are, like their U.S. counterparts, being parented by their fathers as well as by their mothers. A recent analysis of data from eight countries within the European Union by the Population Reference Bureau reported, for example, that "more than half of nonmarital births take place in a cohabiting household." Carl Haub, *Rising Trend of Births Outside Marriage*, Population Reference Bureau (Apr. 2013).

The Organisation for Economic Co-operation and Development (OECD), undertaking an even more global review, has found a steady significant increase in nonmarital births across the many countries that belong to OECD. OECD Family Database, *The Structure of Families: Share of Births Outside of Marriage* 2 (Feb. 4, 2016), http://www.oecd.org/els/family/SF_2_4_share_births_outside_marriage.pdf (citation omitted) (stating that

nearly one-quarter of children were born outside of marriage in 1995 across the 27 OECD countries and that by 2014, the percentage was above 40%). *Cf.* Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, Nat'l Ctr. for Health Stat. Data Br. 5 (May 2009) ("The upward trend in nonmarital childbearing seen in the United States is matched in most developed countries, with levels at least doubling or tripling and in some cases increasing many multiples between 1980 and the mid-2000s.").

In further analysis, the OECD also found that "in many countries the increase in the share of births outside of marriage is largely due to an increase in the number of couples cohabiting outside of a legally registered marriage." OECD Family Database, at 3. The report added: "This is particularly true in many of the Central and South American countries (*e.g.*, Chile, Mexico) where "free unions" (cohabiting, but not legally married) are increasingly common." *Ibid.*

In short, for children born abroad, a presumption that unmarried fathers are not present as parents, by virtue of their being fathers rather than mothers, is likewise neither reasonable nor accurate.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court recognize the sex discrimination underlying the challenged law's extra burdens on nonmarital fathers and affirm the decision of the Second Circuit.

Respectfully submitted,

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